ASSAULT AND BATTERY ON FAMILY OR HOUSEHOLD MEMBER

G.L. c. 265, § 13M

I. INTENTIONAL ASSAULT AND BATTERY

The defendant is charged with having committed an assault and battery on a family or household member, namely *[alleged victim]* **. In order to prove that the defendant is guilty of having committed an intentional assault and battery on a family or household member, the Commonwealth must prove four things beyond a reasonable doubt:**

First: **That the defendant touched the person of** *[alleged victim]* **, without having any right or excuse for doing so;**

Second: **That the defendant intended to touch** *[alleged victim]* **;**

Third: **That the touching was *either* likely to cause bodily harm to** *[alleged victim]* **, *or* was done without (his) (her) consent; and**

Fourth: **That the defendant and** *[alleged victim]* **were family or household members.**

Under the law, two persons are "family or household members" if

(they are or were married to each other)

(they have a child in common)

(they are or have been in a "substantive dating or engagement relationship." To determine whether they were in a "substantive dating or engagement relationship," you should consider (1) the length of time of the relationship; (2) the type of relationship; (3) the frequency of interaction between the defendant and *[alleged victim]* **; and [if applicable] (4) the length of time that has elapsed since the termination of the relationship. A relationship need not be exclusive or committed to be a substantive dating relationship.)**

"The existence of a 'substantive dating relationship' is to be determined as a case-by-case basis." *C.O. v. M.M.*, 442 Mass. 648, 651 (2004). Especially where minors are involved, a "substantive dating relationship" may be conducted electronically. *E.C.O. v. Compton*, 464 Mass. 558, 564-565 (2013). Accordingly, three months of regular electronic communication between a minor and an adult that included intimate conversation and a mutual desire to engage in sexual relations could constitute a "substantive dating relationship." *Id.* at 564. By contrast, the statute does not "apply to acquaintance or stranger violence," and a single date at the cinema is insufficient to support a finding of a "substantive dating relationship." *C.O.*, 442 Mass. at 653-654. A relationship need not be exclusive or "committed" to be a "substantive dating relationship." *Brossard v. West Roxbury Div. of the Dist. Ct. Dep't*, 417 Mass. 183, 185 (1994). Ultimately, the courts "recognize[] the need for flexibility" in applying the definition. *C.O.*, 442 Mass. at 652.

If additional language on intent is appropriate. **As I mentioned before, to prove an intentional assault and battery, the Commonwealth must prove beyond a reasonable doubt that the defendant *intended* to touch** ___*[alleged victim]*___**, in the sense that the defendant consciously and deliberately intended the**

touching to occur, and that the touching was not merely accidental or negligent. The Commonwealth is not required to prove that the defendant specifically intended to cause injury to *[alleged victim]* **.**

The model instruction does not separately define assault, since "[e]very battery includes an assault" as a lesser included offense. *Commonwealth v. Burke*, 390 Mass. 480, 482 (1983). See *Commonwealth v. Porro*, 458 Mass. 526, 533-535 (2010). If the evidence would also permit a jury finding of simple assault, the jury should be instructed on lesser included offenses (Instruction 2.280), followed by Instruction 6.120 (Assault), beginning with the second paragraph.

Commonwealth v. Ford, 424 Mass. 709, 711 (1997) (assault and battery is a general intent crime and does not require specific intent to injure the victim, but its intentional branch requires an intentional touching, and not merely an intentional act resulting in a touching); *Burke*, 390 Mass. at 482-483, 487 (any touching likely to cause bodily harm is a battery regardless of consent, but an offensive but nonharmful battery requires lack of consent or inability to consent); *Commonwealth v. McCan*, 277 Mass. 199, 203 (1931) ("An assault and battery is the intentional and unjustified use of force upon the person of another, however slight, or the intentional doing of a wanton or grossly negligent act causing personal injury to another"). Accord *Commonwealth v. Bianco*, 390 Mass. 254, 263 (1983) (same); *Commonwealth v. Campbell*, 352 Mass. 387, 397 (1967) (same); *Commonwealth v. Musgrave*, 38 Mass. App. Ct. 519, 521 (1995), aff'd, 421 Mass. 610 (1996) (approving instruction for threatened-battery branch of assault that "when we say intentionally we mean that [defendant] did so consciously and voluntarily and not by accident, inadvertence or mistake"); *Commonwealth v. Moore*, 36 Mass. App. Ct. 455, 457-460 (1994) (intentional branch of assault and battery requires proof "that the defendant intended that a touching occur" and not merely "proof that the defendant did some intentional act, the result of which was a touching of the victim"); *Commonwealth v. Ferguson*, 30 Mass. App. Ct. 580, 584 (1991) (intentional branch of assault and battery requires proof "that the defendant's conduct was intentional, in the sense that it did not happen accidentally"). See *Commonwealth v. Bianco*, 388 Mass. 358, 366-367 (1983) (assault and battery by joint venture); *Commonwealth v. Collberg*, 119 Mass. 350, 353 (1876) (mutual consent is no defense to cross-complaints of assault and battery; "such license is void, because it is against the law"); *Commonwealth v. Rubeck*, 64 Mass. App. Ct. 396, 401 (2005) (no substantial risk of miscarriage of justice from omitting separate instruction that parent may use reasonable but not excessive force to discipline child because it is merely an elaboration of "right or excuse" language).

II. RECKLESS ASSAULT AND BATTERY

A. *If intentional assault and battery was already charged on.* **There is a second way in which a person may be guilty of an assault and**

battery. Instead of intentional conduct, it involves reckless conduct that results in bodily injury.

B. *If intentional assault and battery was not already charged on.* **The defendant is charged with having committed an assault and battery upon on a family or household member, namely** *[alleged victim]*, **by reckless conduct.**

In order to prove that the defendant is guilty of having committed an assault and battery on a family or household member by reckless conduct, the Commonwealth must prove three things beyond a reasonable doubt:

First: **That the defendant intentionally engaged in actions which caused bodily injury to** *[alleged victim]*. **The injury must be sufficiently serious to interfere with the alleged victim's health or comfort. It need not be permanent, but it must be more than trifling. For example, an act that only shakes up a person or causes only momentary discomfort would not be sufficient.**

Second: **The Commonwealth must prove that the defendant's actions amounted to reckless conduct.**

And *third:* That the defendant and *[alleged victim]* **were family or**

household members.

Under the law, two persons are "family or household members" if

(they are or were married to each other)

(they have a child in common)

(they are or have been in a "substantive dating or engagement relationship." To determine whether they were in a "substantive dating or engagement relationship," you should consider (1) the length of time of the relationship; (2) the type of relationship; (3) the frequency of interaction between the defendant and *[alleged victim]* **; and [if applicable] (4) the length of time that has elapsed since the termination of the relationship. A relationship need not be exclusive or committed to be a substantive dating relationship.)**

It is not enough for the Commonwealth to prove that the defendant acted negligently — that is, acted in a way that a reasonably careful person would not. It must be shown that the defendant's actions went beyond mere negligence and amounted to recklessness. The defendant acted recklessly if (he) (she) knew, or should have known, that such actions were very likely to cause substantial harm to someone, but (he) (she) ran that

risk and went ahead anyway.

The defendant must have intended (his) (her) acts which resulted in the touching, in the sense that those acts did not happen accidentally.

If relevant to the evidence. **If you find that the defendant's acts occurred by accident, then you must find the defendant not guilty.**

But it is not necessary that (he) (she) intended to injure or strike the alleged victim, or that (he) (she) foresaw the harm that resulted. If the defendant actually realized in advance that (his) (her) conduct was very likely to cause substantial harm and decided to run that risk, such conduct would of course be reckless. But even if (he) (she) was not conscious of the serious danger that was inherent in such conduct, it is still reckless conduct if a reasonable person, under the circumstances as they were known to the defendant, would have recognized that such actions were so dangerous that it was very likely that they would result in substantial injury.

Commonwealth v. Burno, 396 Mass. 622, 625-627 (1986) ("the intentional commission of a wanton or reckless act (something more than gross negligence) causing physical or bodily injury to another"; injury must have "interfered with the health or comfort of the victim. It need not have been permanent, but it must have been more than transient and trifling. For example, if an alleged victim were shaken up but by his own admission not injured, or if an alleged victim were to have a sore wrist for only a few minutes, the 'injury' in each instance would be transient and trifling at most.") (citation omitted); *Commonwealth v. Welch*, 16 Mass. App. Ct. 271, 273-277 (1983) ("The law recognizes . . . an alternative form of assault and battery in which proof of a wilful, wanton and reckless act which results in personal injury to another substitutes for . . . intentional conduct"; elements are [1] that the act involved a high degree of likelihood that substantial harm would result to another, and [2] that the victim suffered physical injury as a result of that act). See also *Commonwealth v. Grey*, 399 Mass. 469, 472 n.4 (1987) ("'The standard of wanton or reckless conduct is at once subjective and objective' . . . . It depends on what the defendant knew (subjective) and how a reasonable person would have acted (objective) knowing those facts."); *Commonwealth v. Godin*, 374 Mass. 120, 129 (1977) (standard "is at once both a subjective and objective standard, and is based in part on the knowledge of facts which would cause a reasonable man to know that a danger of serious harm exists. Such knowledge has its roots in experience, logic, and common sense, as well as in formal legal standards."); *Commonwealth v. Welansky*, 316 Mass. 383, 399 (1944) ("Wanton or reckless conduct amounts to what has been variously described as indifference to or disregard of probable consequences").

SUPPLEMENTAL INSTRUCTION

Victim injured while escaping. **The defendant may be convicted of assault and battery if the Commonwealth has proved beyond a reasonable doubt that the defendant caused** *[alleged victim]* **reasonably to fear an immediate attack from the defendant, which then led (him) (her) to try to (escape) (*or*) (defend) (himself) (herself) from the defendant, and in doing so injured (himself) (herself).**

Commonwealth v. Parker, 25 Mass. App. Ct. 727 (1988).

NOTES:

1. **Certified batterer's intervention program.** Any sentence or continuance without a finding for strangulation or suffocation must include a condition that the defendant complete a certified batterer's intervention program unless "the court issues specific written findings describing the reasons that batterer's intervention should not be ordered or unless the batterer's intervention program determines that the defendant is not suitable for intervention." G.L. c. 265, § 13M(d).

2. **Verdict slip where alternate theories of guilt.** If the evidence would warrant a guilty verdict for an offense on more than one theory of culpability, the judge must provide the jury with a verdict slip to indicate the theory or theories on which the jury bases its verdict and, on request, instruct the jurors that they must agree unanimously on the theory of culpability. *Commonwealth v. Accetta*, 422 Mass. 642, 646-647 (1996); *Commonwealth v. Plunkett*, 422 Mass. 634, 640 (1996); *Commonwealth v. Barry*, 420 Mass. 95, 112 (1995). See the appendix for a sample verdict slip that may be used when an assault and battery charge is submitted to the jury under both the intentional and reckless branches of assault and battery, and without any lesser included offenses. The sample verdict slip must be adapted to include additional options if any lesser included offenses are submitted to the jury. Where the jury is presented with a lesser included offense of assault, and the Commonwealth proceeds upon the alternate theories of an attempted battery or an imminently threatened battery the jury need not be unanimous as to the theory and a special verdict slip requiring the jury to elect between the theories is not proper. *Commonwealth v. Arias*, 78 Mass. App. Ct. 429, 433 (2010).

3. **Abuse prevention order admissible in evidence.** In a prosecution for assault and battery, a judge may admit evidence of prior circumstances under which the alleged victim had obtained an abuse prevention order under G.L. c. 209A against the defendant. While such evidence is not admissible to show bad character or propensity to commit the assault and battery, it is admissible to provide a full picture of the attack, which otherwise might have appeared as an essentially inexplicable act of violence. *Commonwealth v. Leonardi*, 413 Mass. 757, 762-764 (1992). Such an abuse prevention order must be redacted of statements that the court determined there was a substantial likelihood of immediate danger of abuse and that the defendant must surrender firearms. *Commonwealth v. Reddy*, 85 Mass. App. Ct. 104, 109-111, *rev. denied*, 468 Mass. 1104 (2014).

4. **Medical testimony.** In a prosecution for assault and battery, medical testimony about the victim's injuries is admissible to establish that the defendant's assault on the victim was intentional and not accidental. *Commonwealth v. Gill*, 37 Mass. App. Ct. 457, 463-464 (1994).

5. **Statement of reasons required if imprisonment not imposed.** A jury session judge sentencing for this or one of the other crimes against persons found in G.L. c. 265 who does not impose a sentence of incarceration "shall include in the record of the case specific reasons for not imposing a sentence of imprisonment," which shall be a public record. G.L. c. 265, § 41.